This record is a partial extract of the original cable. The full text of the original cable is not available.

UNCLAS SECTION 01 OF 07 GENEVA 001825

SIPDIS

SENSITIVE

PASS USTR FOR ALLGEIER, DWOSKIN
STATE/EB/OT FOR CRAFT
USDA/FAS/ITP FOR MTND/HENKE, FAA/SE/WILSON
USDOC FOR SPETRINI, JACOBS

E.O. 12958: N/A
TAGS: ETRD WTRO USTR
SUBJECT: 11-15 JULY 2005 MEETINGS OF THE WTO RULES NEGOTIATING GROUP

This cable is Sensitive but Unclassified - Please Protect Accordingly

SUMMARY

¶1. (SBU) The WTO Rules Negotiating Group met formally and informally 11-15 July 2005. Thirteen papers were submitted for these meetings (nine on antidumping and countervailing duties, one on subsidies and three on fisheries subsidies) demonstrating a continued high level of interest in these negotiations; the negotiating group ran out of time for discussion, so five of these papers will be taken up at the September meeting. The Chairman also continued his plurilateral consultations with a smaller group of approximately 14 delegations; this has become an important forum primarily for the discussions on antidumping, although for the first time in the plurilateral consultations the group took up a proposal on subsidies (a paper by the United States on the allocation of subsidies). There were also substantive discussions on papers from Egypt on currency conversion in antidumping calculations, Canada on special dispute settlement rules from antidumping and countervailing duty cases, China on establishing post-initiation comment procedures, and two papers from the Friends of Antidumping Negotiations, one on limiting the number of exporters examined and one on introducing a public interest test. A prior discussion of a paper by the Friends on reviews of antidumping duty measures was also resumed.

¶2. (SBU) There were also fisheries subsidies papers from Japan on illegal, unreported and unregulated ("IUU") fishing and from Australia, Ecuador and New Zealand on aquaculture. However, the most significant discussion of the week related to a very ambitious paper by Brazil laying out a broad proposal on the kinds of subsidies that should be prohibited or permitted, and on special and differential ("S&D") treatment for developing countries. Although there was much informal discussion about how to intensify the negotiations in anticipation of the Hong Kong Ministerial meeting in December, for example by lengthening the meetings or forming smaller groups to address specific issues, no changes were formally announced. The United States also used the opportunity of the Rules Group meeting to meet bilaterally with, among others, Brazil, China, Mexico and Norway, and plurilaterally with the EC, Australia and Canada to discuss countervailing duty and subsidy issues. The next Rules Group meeting will be held 26-30 September 2005. End summary.

ANTIDUMPING

EGYPT PAPER ON CURRENCY CONVERSION

¶3. (SBU) Egypt presented in formal session its paper (TN/RL/W/183) on clarifying the rules on conversion of currency in antidumping calculations, specifically, by defining the terms "fluctuation" and "sustained movement" of currency, as they are used in Article 2.4.1 of the antidumping agreement. Most of the comments by Members were supportive, although several Members asked Egypt to describe its own methodology. Several Members, including Brazil and Japan, noted that this would be a very difficult issue to negotiate, and therefore tended to favor a prior US proposal (TN/RL/GEN/5) which approached the issue as one of transparency, by asking Members to report their practices to ensure consistency, rather than attempting to define permissible practices. Korea and Thailand both stated that they had no experience with this provision in their antidumping practice. The EC recalled the difficult negotiations on this issue in the Uruguay Round, and said that it avoided the problem by using average exchange rates; where there is a problem, the EC breaks its averaging into sub-periods, such as months.

CANADA PAPER ON DISPUTE SETTLEMENT

¶4. (SBU) Canada presented its paper (TN/RL/GEN/48) in informal session and in the plurilateral meeting on improving dispute settlement procedures in cases involving antidumping and countervailing duty measures. The proposal would require a Member, promptly upon a finding by the dispute settlement body of any WTO-inconsistency in an antidumping or countervailing duty

measure, to suspend the measure until a new, compliant measure is put into place and approved by a panel. Unlike an earlier proposal by Canada (TN/RL/GEN/37), this proposal was modified so as not to require refund of all duties back to the time the measure was originally put into place. (NOTE: This proposal reflects Canada's concerns that its companies have had to make large deposits of antidumping and countervailing duties during the ongoing disputes relating to softwood lumber.)

¶5. (SBU) This version of Canada's proposal received much broader support, particularly among some of the Friends of Antidumping. However, from the tone of interventions, it is not clear how seriously Members are taking this proposal. A number of Members questioned whether this proposal goes too far in the case of minor inconsistencies. Several Members, including Japan and the US also asked why this proposal was limited to antidumping and countervailing duty measures; the US noted that the economic harm from measures inconsistent with other agreements could be just as great; Mexico noted that in the DSU negotiations it had made a similar proposal applicable to all agreements; Brazil, half-jokingly, suggested it would like to see this proposal applied to the agriculture agreement. Canada replied that special treatment was justified by the high number of challenges to antidumping and countervailing duty measures, and by the large amounts of money involved. Japan also asked how the proposal would affect prospective duty collection systems, which would not be able to reach back and collect any duties if the Member taking the measure is successful on appeal; they suggested that in light of this problem, the proposal should be limited to retrospective duty assessment systems. (NOTE: The US has the only clearly retrospective duty assessment system for antidumping and countervailing duties.) The EC described Canada's paper as a move in the right direction, and it looked favorably on it; however, it noted that there are certain details of the proposal that need to be worked out.

FRIENDS PAPER ON LIMITED EXAMINATION
AND THE ALL OTHERS RATE

¶6. (SBU) Norway on behalf of the Friends of Antidumping presented their paper (TN/RL/GEN/46) in informal session on conditions under which an authority may limit the number of exporting companies it examines in an antidumping investigation, and how it calculates the "all others" rate applicable to non-investigated exporters. While several Members said that the provisions of the Antidumping Agreement in question needed clarification, support for this paper was quite limited. Many Members questioned the feasibility of the proposal to require examination of at least 2/3 of the exporters in every case.

¶7. (SBU) The US suggested that more clarification was needed of the kinds of reasons that would justify a limited examination, and also noted that the proposal to require authorities to accept up to ten volunteered responses in addition to the 2/3 of exporters it was otherwise required to examine seemed to require the impossible, and effectively required examination of all exporters in virtually all cases. Mexico argued that all known exporters should receive a questionnaire, but those who did not make themselves known and "remained in the shadows" should be treated as uncooperative; after the exporters have responded, the authority can decide for which of them it will calculate a margin of dumping. (NOTE: Mexico recently lost a dispute settlement challenge by the US to its antidumping measure on rice and was criticized by the Panel for passively waiting for exporters, who may not have known about the case, to announce their interest to the authorities, and treating any who did not as uncooperative parties subject to highest possible rate of duty.) The EC delivered a long (over 30 minute) critique of the paper that drew an equally long defense by Norway. (NOTE: Norway is reportedly unhappy about the way the EC selected exporters in its recent investigation of Salmon, which may, in part, have been the genesis of this paper and would explain the tone of the final exchange.)

CHINA PAPER ON ESTABLISHMENT OF
COMMENT PERIOD AFTER INITIATION

¶8. (SBU) China presented in the informal session its paper (TN/RL/GEN/55) on establishing a formal 20-day comment period after initiation during which all investigative activity would be suspended while parties commented on the allegations in the petition, the product coverage of the investigation, and any other issue they thought needed to be addressed promptly. The response to the paper was quite positive, although the Friends clearly are of the view that the paper does not go far enough in disciplining initiations, while most users of antidumping were concerned about the disruption of their process. Korea and Norway agreed that there should be a time set aside for comment on the petition, but that time should be prior to initiation so that improper initiations can be avoided. The EC seemed to echo this view by observing that it may be more difficult for authorities to end an investigation that has already begun than never to begin one at all. Brazil wondered why this proposal is necessary, as parties can already submit any comments they believe are relevant; it asked if establishing a formal comment period would preclude comments later. The US also noted that,

while it is not opposed to this concept, parties are already free to submit comments at any time; the US asked for more details about how this proposal would work in practice. Australia expressed concern that this proposal would delay the questionnaire, which is a serious concern given its relatively short investigation period. China recognized the possible timing implications of its proposal and indicated that it did not believe that it would extend the procedure too long.

FRIENDS PAPER ON LESSER DUTY

¶9. (SBU) The Friends presented their paper on lesser duty (TN/RL/GEN/430 during the plurilateral consultations, and India also re-presented a paper it had submitted in the spring (TN/RL/GEN/32). Neither Japan (for the Friends) nor India had much new to say about their Lesser Duty proposals. The discussion was dominated by the EC and Brazil (co-sponsor from the Friends), each discussing their respective lesser duty practices and methodologies. The EC, in particular, seemed intent on seizing leadership of the issue, by criticizing the Friends' proposal and methodologies at great length, and explaining how the EC's methodology was the only real workable one consistent with a high level of ambition. The EC also criticized the technical level of the discussion of the proposals before Members really had begun that discussion.

¶10. (SBU) The EC lost some of its bluster, however, when Korea said that, unlike the inflexible US system, the EC "negotiates" the lesser duty between exporters and the domestic industry. The EC indignantly denied that they "negotiate" this, stating that the Commission applies rules, although the administrators of course have a certain degree of discretion. A continuation of the discussion focused on the determination of an appropriate level of profit when calculating a lesser duty and again highlighted the high degree of administrative discretion in some Members' practices. The US used these exchanges to point out the dangers of "managed trade" posed by these proposals. Another big focus of the discussion was the impact of the application of the dispute settlement system on lesser duty methodologies, which are currently discretionary and largely non-transparent. There was also a discussion of how judicial review in the US would affect the lesser duty methodologies. The US raised a number of other concerns, previewing the issues raised in the US paper (TN/RL/GEN/58) to be discussed in September. Egypt, Argentina and Canada also raised concerns about a mandatory lesser duty rule, but a number of Members, such as China, remained silent. The Chairman stated that we will continue the discussion of lesser duty at the September plurilateral session.

FRIENDS PAPER ON PUBLIC INTEREST

¶11. (SBU) On behalf of the Friends, Hong Kong presented in the informal session the revised paper (TN/RL/GEN/53) on a mandatory public interest test. Hong Kong pointed out that the proposal is limited to requiring examination of a measure's economic effects, rather than the broader public interest. The proposal also does not define how those effects should be examined, although that can be discussed at a later meeting. India noted that all Members consider their public interest, but asked whether we really need a legal obligation; it also asked Members to share their experiences. Canada, which has an infrequently-used public interest provision in its current law, indicated that it supported the thrust of the paper, but believed that such an inquiry should be distinct from the determination of AD/CV duties. It believed that a public interest test should be considered only after a Member has determined that antidumping measures are otherwise appropriate. Reflecting comments by many Members at the prior meeting, Brazil expressed concern about how a public interest decision would be treated by a dispute settlement panel. China complained that the new version of this paper was limited to economic interests, rather than broader public interest; in China's view Members should consider such issues as public health, the environment and national security in deciding whether to apply antidumping duties. At this point, time ran out, but the Chair said he would return to this paper at the September meeting.

FRIENDS PROPOSAL ON REVIEW
PROCEEDINGS UNDER ARTICLE 9

¶12. (SBU) Korea presented in the plurilateral consultations the FANs paper (TN/RL/GEN/44) on proposals for Article 9 procedures (imposition and collection/assessment of antidumping duties). This was the second time the paper was discussed during plurilateral consultations. (Note: at the last plurilateral, the FANs were having such difficulty explaining and justifying their proposals that the Chairman stopped the discussion and asked that proponents do some homework in order to better present their case for the next meeting.) This time Korea was better prepared and the discussions went more smoothly, although little, if any convergence on issues was reached.

¶13. (SBU) The FANs' paper advocates that certain rules and principles applicable to the investigation phase of a dumping investigation be equally applicable to subsequent proceedings (for example new shipper reviews and, in the U.S. system,

"administrative reviews," during which the final assessment of antidumping duties is determined). Two central issues flow from this proposal: (1) whether the practice of "zeroing" should be disallowed in the context of administrative reviews and (2) whether the "de minimis" threshold in investigations should be applicable to administrative reviews. Because the practice of zeroing in the context of administrative reviews is currently being examined by two WTO dispute settlement panels, Members recognized that further discussion of the issue should wait until after the examination of the panel reports. As to the de minimis issue, the FANs argued that there was no reason why the two percent threshold applicable in investigations should not be equally applicable to administrative reviews. The United States countered by stating that the de minimis threshold was a negotiated threshold without any substantive meaning and that, as the WTO Appellate Body has recognized, nothing in the current text of the Antidumping Agreement required the two percent threshold to be applicable to administrative reviews.

¶14. (SBU) The FANs paper also proposed that the evidence and due process provisions of Article 6 become applicable to Article 9 review proceedings. As an initial matter, several Members, including the United States, made the point that the FANs should clarify precisely which specific provisions of Article 6 should be applicable Article 9 proceedings and for the provisions that would apply, precisely how they would apply. More generally however, the United States expressed some support for this proposal given that numerous due process procedures are already part of U.S. practice. Others with less transparent systems were more argumentative. The EC, for example, asked the FANs to explain their practice in this area, knowing that Korea, despite being a significant user of the antidumping remedy, has conducted very few, if any, reviews under Article 9. Korea's unconvincing response was that their initial investigations were so thorough that subsequent reviews were unnecessary. The EC also made the relatively weak argument that Article 9 proceedings in the EC system were only of concern to the importer and exporter being examined, ignoring the fact that decisions made in one determination might establish an important precedent in other proceedings involving similarly situated interested parties. Overall, given the vastly different systems of Members under Article 9 (e.g., retrospective versus prospective duty collection), it became abundantly apparent that the FANs proposals would have varying ramifications and that Members were reluctant change their particular duty collection system.

SUBSIDIES

US PAPER ON WHEN AND HOW TO ALLOCATE
SUBSIDY BENEFITS OVER TIME

¶15. (SBU) The US presented in informal session, and again in the plurilateral consultations, its paper (TN/RL/GEN/45) synthesizing and elaborating upon three earlier proposals (TN/RL/GEN/4, TN/RL/GEN/12 and TN/RL/GEN/17) on the decision of whether to allocate the benefits of a subsidy over time rather than attributing them solely to the year of receipt. If benefits are allocated, the US paper addressed the period and model of the allocation. The US noted that there are at least three possible bases for distinguishing subsidies to be allocated from those to be expensed: frequency, size and use. There was broad support for the US approach which identifies subsidies to be allocated based on frequency with which the subsidy is granted, i.e., on whether a subsidy is recurring or non-recurring, with the latter subsidies being allocated over time. On this point, Canada noted that it distinguishes subsidies based on the use and purpose of the subsidy, and would want any rules or guidelines on subsidy allocation to remain sufficiently flexible to accommodate Members' different approaches. The US agreed that some flexibility should be preserved, and noted that the Canadian and US methodologies often lead to the same result.

¶16. (SBU) While there also appeared to be general agreement as to the use of the average useful life of assets in the industry in question as the allocation period, several Members commented that they favored using an allocation period based on the average useful life of industry assets in the exporting country rather than on the assets of the importing company, as suggested by the US. The US pointed out that this would mean that in a countervailing duty investigation, similar subsidies given by different exporting countries could result in different countervailing duty rates and, moreover, the average useful life of particular assets are generally the same regardless of the country in which they are used.

¶17. (SBU) With regard to the US proposal that the time value of money be factored into any allocation model, Brazil suggested that, as in the case of the export credit rules, this would disadvantage developing countries who generally have higher costs of capital. The US responded that the time value of money is a fundamental principle of finance, that the export credit rules are an entirely separate issue, and that a GATT Panel and an Informal Group of Experts has already endorsed inclusion of the time value of money in any allocation formula. Finally, several Members asked whether the US proposal would only apply to countervailing measures, or would also apply to direct dispute

settlement challenges to subsidies. The US responded that it was focusing on countervailing duties, but suggested that it may be appropriate to apply these principles to other parts of the Subsidies Agreement as well and that there should be a separate discussion on this issue.

FISHERIES SUBSIDIES

¶18. (SBU) On July 15, meeting for almost a full day, the Rules Negotiating group discussed the fish subsidies element of its mandate, in what may have been the most substantive and technical discussion to date. Three papers, from Japan, Australia, and most importantly, from Brazil, addressed which kinds of subsidies should or should not be permitted under a future agreement. Japan's paper provided an overview of international efforts to combat illegal, unreported and unregulated ("IUU") fishing. Australia, Ecuador and New Zealand cosponsored an informative paper to help Members decide whether new fisheries subsidies disciplines should be applicable to acquaculture and whether there might be a risk of circumvention of stronger disciplines on wild (fisheries) if aquaculture were excluded. Brazil's paper presented a detailed, revised proposal addressing which particular subsidies should be actionable, and what special provisions might apply to developing countries. While there are many difficult issues ahead, it is clear that the negotiating group is engaging at a technical level that is necessary to make significant progress in the negotiation.

JAPAN PAPER ON "IUU"
FISHING

¶19. (SBU) In welcoming Japan's paper, Members acknowledged the role of IUU fishing in depleting fisheries resources and distorting trade but roundly questioned the WTO's role in addressing the matter. Canada and Chile took the opportunity to inform Members of their countries' successful conclusion of national plans of action implementing the FAO International Plan of Action on IUU Fishing. Many delegations pointed out the obvious fact that no country explicitly subsidizes IUU fishing. These delegations suggested that overcapacity was the primary driver of IUU fishing, and that stronger disciplines on subsidies that contribute to overcapacity would help address the causes of IUU fishing. There was also an extensive discussion of the only example given by Japan of the kind of subsidy that should be disciplined to help address IUU fishing: subsidies associated with transferring vessels from a contracting party of a regional fisheries management organization (RFMO) to a non-contracting party of an RFMO and vice versa.

AUSTRALIA, ECUADOR AND
NEW ZEALND PAPER ON AQUACULTURE

¶20. (SBU) Australia characterized its paper as an attempt to spark debate on what aspects of aquaculture were within or outside the scope of the Rules Negotiations. The Australian delegate said it was important that new disciplines on fisheries subsidies not weaken existing disciplines on aquaculture and reminded delegations of the rapid growth of the sector and the interplay between wild caught and farming operations (as feed fish and as fingerlings for ranching operations, for example). Although certain delegations, including the United States, pointed out the importance of debating the implications of not specifically including aquaculture as a focus of the negotiations, there was a general sense that (1) wild capture fisheries should be the focus of this negotiation and (2) any subsidy element associated with wild caught inputs to the sector would likely be captured by new and/or existing disciplines.

BRAZIL PAPER ON FISHERIES SUBSIDIES
AND SPECIAL AND DIFFERENTIAL
TREATMENT

¶21. (SBU) Brazil's proposal has been the most ambitious and far-ranging in the discussions so far, as it attempts to lay out a broad plan of the kinds of subsidies which should be prohibited or permitted, and of the circumstances under which special and differential treatment should be granted to developing countries. The proposal would prohibit all subsidies to the wild (capture) fisheries sector (that is, excluding aquaculture and inland fisheries), except for programs included in a non-actionable green box. The non-actionable programs would include subsidies for various conservation, health and safety purposes, programs to reduce fishing capacity (i.e., buybacks) and retraining programs for fishermen. Subsidies to artisanal and small-scale fishing would also be non-actionable depending upon the state of the stock (as determined by the FAO). The paper offers definitions of "artisanal" and "small-scale" fishing. (Note: this exclusion would apparently apply to developed as well as developing countries.) However, if any vessel and/or company of a Member were found to engage in IUU fishing, serious prejudice would be deemed to exist for all of that Member's otherwise non-actionable subsidies. Members would have three years to phase out or eliminate all prohibited subsidies. Members would also have to comply with more detailed notification requirements (including information identifying the fishery receiving the subsidy, subsidy amounts on a per vessel/fleet/fishery basis and the management status of the fishery); if a subsidy is not notified,

it would be presumed to be prohibited.

¶22. (SBU) For developing countries, an additional list of subsidies would be permitted under certain conditions (e.g., Members which are part of a regional fisheries management organization would receive special flexibility), including subsidies to fishing vessel construction, repair and modernization, government-to-government payments for access to a country's Exclusive Economic Zone (EEZ) and assistance to disadvantaged regions. However, serious prejudice would be presumed in certain circumstances (e.g., subsidies benefiting any vessel not operating under the rules of a regional fisheries management organization).

¶23. (SBU) The paper was very well received with many delegations applauding the substantive work and level of technical engagement. Virtually every aspect of the paper provoked discussion as delegates responded to the many details offered in the paper, mostly reacting to the text rather than questioning the Brazilian formulation or assumptions. Developing countries, such as India, Pakistan, Sri Lanka, Thailand, et al, welcomed the S&D provisions but questioned the strictures involved. Japan, Korea and Chinese Taipei in an apparent concern for the treatment of China, criticized the two-tiered approach to disciplining subsidies. Korea questioned whether the proposal was too elaborate at this stage in the negotiations. Many countries questioned the draconian nature of the one-strike-and-you-are-out proposal on IUU fishing and the difficulties of meeting the notification requirements, although many countries welcomed strong transparency provisions, including the EC which has made transparency its strongest objective. There were calls for further refinement of distinctions between artisanal and small scale fisheries. In every instance, Brazil described its paper as a work in progress intended to stimulate discussion, and expressed flexibility on the particulars.

¶24. (SBU) The United States reaffirmed its discomfort with a green light category, and questioned if some of the proposed greenlight programs could instead be simply exempted from the contemplated stricter disciplines. New Zealand highlighted the need to keep the approach simple and suggested that infusing a de minimis threshold into the negotiated text might obviate the need for an S&D response to every provision.

TECHNICAL GROUP ON QUESTIONNAIRES

¶25. (SBU) The technical group on questionnaires reconvened to continue a discussion of Members' practices with regard to antidumping questionnaires. For this meeting, the Group's Chairman provided members with a matrix comparing the standard exporter questionnaires of Brazil, China, The European Communities, India, New Zealand, and the United States. The Group reviewed sections of the matrix addressing company contact information, corporate structure, and affiliation. The Chair concluded that there was general agreement on two points: 1) E-mail addresses should be requested and used to facilitate the process of collecting data, recognizing that the medium may not be appropriate for the transmission of certain information; and 2) an organization chart of the respondent company is a useful tool which should be requested. Finally, the Chair noted that Members' questions regarding affiliation differ significantly. The level of detail contained in the United States' affiliation questions became the focus of the discussion, but the session concluded with no consensus on the requisite questions that should be asked with regard to affiliation.

PROCEDURAL ISSUES AND BILATERAL MEETINGS

¶26. (SBU) The Chairman held a series of meetings with individual Members and small groups to discuss ways to intensify the process leading up to the Hong Kong ministerial in December. The Chair made it clear that in his view the current process is working well, but may need to be augmented. The problem with the current process was illustrated by the fact that the Group did not have time to discuss four of the papers submitted for this meeting. Various ideas were floated including lengthening the meetings, and appointing "facilitators" to guide the discussions on certain issues. However, the Chair did not announce at the meeting any specific decision regarding the details of such proposals. (NOTE: In a subsequent report to the Trade Negotiating Committee, the Chair stated that he expected to select "Friends of the Chair" to advance the work on particular issues.)

¶27. (SBU) The United States had a bilateral meeting at the request of Brazil in order to allow its administrators to make a presentation on their calculation of a "lesser duty" in antidumping investigations. The United States met bilaterally with China and with Mexico to get a better sense of their views on the progress of negotiations. The United States also met bilaterally with Norway to discuss its proposal on transparency and due process in antidumping investigations that it will be presenting to the negotiating group in September. Finally, the United States met plurilaterally with the EC, Canada and Australia to discuss how to move the countervailing duty/subsidy aspects of the negotiations forward. Shark